

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Robert Charles McNamara
Rye, New York,

Respondent.

Decision

Complaint No. 2016049085401

Dated: July 30, 2019

Respondent failed to disclose to his employer brokerage accounts held at another broker-dealer, improperly purchased equity initial public offering shares in an account held at that broker-dealer, and provided inaccurate information to that broker-dealer in order to purchase those shares. Held, findings and sanctions modified.

Appearances

For the Complainant: Margery M. Shanoff, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Robert Charles McNamara, Pro Se

Decision

Robert Charles McNamara appeals a June 13, 2018 Hearing Panel decision pursuant to FINRA Rule 9311. The Hearing Panel found that McNamara, while associated with Advisors Assets Management, Inc. (“AAM”), failed to disclose to the firm six brokerage accounts held at Merrill Lynch, Pierce, Fenner and Smith Inc., in violation of NASD Rule 3050 and FINRA Rule 2010.¹ The Hearing Panel further found that McNamara purchased equity initial public offering (“IPO”) shares while he was associated with AAM, in violation of FINRA Rules 5130 and 2010. Last, the Hearing Panel found that McNamara provided to Merrill Lynch inaccurate information regarding his status as an associated person in order to facilitate the equity IPO transaction, in violation of FINRA Rule 2010. In determining sanctions for these violations, the Hearing Panel

¹ NASD Rule 3050 was replaced by FINRA Rule 3210 effective April 3, 2017. We apply the FINRA rules in effect at the time of the conduct at issue.

found that each violation was the result of McNamara's recklessness, and it considered that an aggravating factor. The Hearing Panel fined McNamara a total of \$10,000, suspended him from associating with any FINRA member in any capacity for a total of three months, and ordered him to requalify as a general securities representative before reentering the securities industry.

McNamara raises two main issues on appeal. First, he argues that the Hearing Panel incorrectly held him liable under NASD Rule 3050 for failing to disclose to AAM two individual retirement accounts (IRAs) held at Merrill Lynch in his wife's name only. McNamara contends he had no obligation to disclose these accounts because he did not have a financial interest in them nor did he exercise discretion over them. Second, McNamara argues that the sanctions the Hearing Panel imposed are excessive. Specifically, he argues that the Hearing Panel's finding that he acted recklessly was erroneous and that the Hearing Panel failed to consider relevant mitigating factors.

After reviewing the entire record, we modify the Hearing Panel's findings and the sanctions it imposed.

I. Background

A. Robert Charles McNamara

McNamara was associated with Merrill Lynch from 1999 until February 2009. He was not involved in the firm's retail securities business and was not registered with FINRA. In May 2009, McNamara became associated with AAM. Approximately one year later, in late April 2010, he registered as a general securities representative. In May 2010, he registered as an investment banking representative, and in September 2010, he registered as a general securities principal. McNamara was permitted to resign from AAM in July 2018 immediately following the issuance of the Hearing Panel's decision in this matter. McNamara is not currently associated with any FINRA member.

B. McNamara Fails to Disclose Outside Accounts

1. McNamara Opens Accounts at Merrill Lynch

While McNamara was associated with Merrill Lynch, he and his wife opened a total of four self-directed accounts at the firm (collectively, the "Original Accounts"). McNamara had an ownership interest in three of those accounts: (1) a cash management account jointly owned by McNamara and his wife (the "Original Joint Account"); (2) a traditional IRA in McNamara's name (the "Original IRA"); and (3) a rollover IRA in McNamara's name (the "Original Rollover IRA"). The fourth account, another rollover IRA, was in McNamara's wife's name only (the "Original Spousal IRA"). McNamara testified that his wife contributed all of the money in the Original Spousal IRA and made all of the investment decisions for that account. McNamara further testified that, while employed at Merrill Lynch, he never had to disclose any outside accounts because all of his accounts were held at that firm.

2. McNamara Associates With AAM and Fails to Disclose All of His Accounts at Merrill Lynch

McNamara left Merrill Lynch in February 2009 and became associated with AAM in May 2009. AAM's business focused primarily on providing services to other broker-dealers and the firm had very few retail customer accounts. AAM hired McNamara to do corporate development work, and therefore, McNamara did not immediately register with FINRA.

As part of its onboarding process, AAM required McNamara to complete an Outside Brokerage Account Disclosure Form (the "Account Disclosure Form"). The Account Disclosure Form did not refer to any FINRA rule, but stated that, before placing an order for the purchase or sale of a security through another broker-dealer, "all employees of AAM shall notify the Compliance Officer of the account, using this form," and must "also notify the other firm, in writing, of the employee's association with AAM." The Account Disclosure Form further stated that "[i]f the employee's account was established prior to their association with [AAM], the employee shall notify both AAM and the executing firm, in writing within 30 days after becoming so associated with AAM."

When McNamara completed the Account Disclosure Form, he disclosed the Original Joint Account but none of the other accounts he and his wife held at Merrill Lynch. McNamara testified that he understood the purpose of the form was to identify any accounts held away from AAM so the firm could request duplicate confirmations and statements from the broker-dealer where the accounts were held. McNamara testified that he assumed when AAM requested duplicate confirmations and statements for the Original Joint Account, Merrill Lynch automatically would provide them for all of the other accounts, as well. He assumed this because he believed all of his and his wife's accounts were "householded" at Merrill Lynch, and that the Original Joint Account was the "main account."

Shortly after McNamara returned the completed Disclosure Form to AAM, the firm's chief compliance officer drafted a letter to Merrill Lynch requesting duplicate confirmations and statements for the Original Joint Account. For unknown reasons, however, AAM never sent the letter to Merrill Lynch. As a result, Merrill Lynch did not provide AAM with duplicate confirmations and statements for any of the Original Accounts.

3. McNamara Opens New Accounts at Merrill Lynch and Fails to Disclose All of Them to AAM

In early 2010, AAM offered McNamara the opportunity to purchase stock in its parent company through a private placement. Merrill Lynch would not allow McNamara to hold these shares in any of his self-directed accounts. At a family gathering, McNamara discussed the private placement with a family member who was a broker at Merrill Lynch. The broker advised McNamara that he could hold the private placement shares in a full-service account. Based on this advice, McNamara and his wife decided to open four full-service accounts with the broker at Merrill Lynch and close their four self-directed accounts at the firm.

In April 2010, Merrill Lynch opened four accounts for McNamara and his wife (collectively, the “New Accounts”). These accounts included (1) a new joint cash management account owned by McNamara and his wife (the “New Joint Account”); (2) a new traditional IRA in McNamara’s name (the “New IRA”); (3) a new rollover IRA in McNamara’s name (the “New Rollover IRA”); and (4) a new rollover IRA in McNamara’s wife’s name (the “New Spousal IRA”). After opening the New Accounts, McNamara and his wife asked their broker to close each of the Original Accounts and transfer the assets into the corresponding New Account.

McNamara did not complete a new Account Disclosure Form after opening the New Accounts. McNamara testified he did not think it was necessary because he believed he had simply “converted” his self-directed accounts into full-service accounts with the same broker-dealer, and he believed he already had adequately disclosed his self-directed accounts via the Account Disclosure Form.

Although McNamara did not complete a new Account Disclosure Form, AAM became aware of the New Rollover IRA in late April 2010, when McNamara directed the firm to deposit his shares from the private placement in that account.

4. McNamara Discloses All of the New Accounts at Merrill Lynch to AAM

McNamara eventually disclosed the rest of the New Accounts to AAM in mid-2011. In April 2011, AAM designated McNamara an “access person,” as defined under the Investment Company Act of 1940. As part of that designation, AAM required McNamara to disclose all of his holdings in his and his wife’s outside accounts and provide copies of statements for those accounts. In April 2011, McNamara provided to AAM a list of all of the holdings in each of the New Accounts. In July 2011, he provided copies of the quarterly statements for each of the New Accounts.²

C. McNamara Purchases Equity IPO Shares While Associated With AAM

In November 2010, McNamara purchased equity IPO shares while he was associated with AAM. McNamara testified that he had never purchased shares in an equity IPO before, but he was interested in this particular IPO because the issuer was an independent broker-dealer. According to McNamara, the IPO “was a coming out party of sorts for the whole independent broker-dealer segment,” and was “[v]ery exciting for the folks in the [independent broker-dealer] space and folks who service the space like [AAM].”

On November 15, 2010, McNamara sent an email from his AAM email account to his broker at Merrill Lynch asking: “Can you get me any of that IPO?”

Shortly after McNamara sent the email, his broker called McNamara at work to discuss the transaction. During that conversation, the broker told McNamara he would send a form that

² The parties jointly stipulated that McNamara had disclosed all of the New Accounts to AAM by July 29, 2011.

McNamara needed to complete before he could buy the shares. According to McNamara, he and the broker did not discuss “eligibility, restrictiveness, [or] anything like that” during the call.

The broker then sent an email to McNamara, via McNamara’s AAM email account, attaching a Merrill Lynch form, “Client Affirmation of Eligibility for Initial Public Offerings” (the “Client Affirmation”). The Client Affirmation stated, in part, that Merrill Lynch “is not permitted to sell [equity IPOs] to any account that is beneficially owned by . . . Restricted Persons.” It went on to define the term “Restricted Person” to include an employee of any “NASD member firm or other broker-dealer[.]” The Client Affirmation asked whether the account that was purchasing the equity IPO shares was “beneficially owned 10% or more by one or more Restricted Persons, as defined above?” McNamara checked “No.” McNamara signed the form shortly after receiving it and returned it to his broker at Merrill Lynch.

On November 18, 2010, McNamara purchased 200 equity IPO shares for \$30 per share in the New IRA (AAM was aware of this account at the time of the transaction).

The next morning, at AAM’s office, McNamara discussed the IPO with a colleague who was AAM’s head of sales and trading. McNamara mentioned that he had bought shares in the IPO and had “made some money” on it. McNamara’s colleague informed him that associated persons were not allowed to purchase equity IPO shares. The colleague advised McNamara to call AAM’s chief executive officer (“CEO”) and explain what had happened.

McNamara went back to his office, called the CEO, and disclosed the transaction. The CEO told McNamara that he would contact the firm’s chief compliance officer (“CCO”), and the CCO would get back to McNamara later that day. The next day, Saturday, November 20, the CCO sent an email to McNamara instructing him to “sell the position and donate any proceeds to charity.” The following Monday, McNamara called his Merrill Lynch broker and directed him to sell the IPO shares. McNamara made a profit of approximately \$500 on the transaction, which he donated to a private university.

II. Procedural History

On August 14, 2017, the Department of Enforcement filed a three-cause complaint against McNamara. Cause one alleged that McNamara violated NASD Rule 3050 and FINRA Rule 2010 by not disclosing to AAM six accounts held at Merrill Lynch, including the Spousal IRA and the New Spousal IRA. Cause two alleged that McNamara violated FINRA Rules 5130 and 2010 by purchasing equity IPO shares while he was associated with AAM. Cause three alleged that McNamara violated FINRA Rule 2010 by inaccurately attesting to Merrill Lynch, via the Client Affirmation, that he was not associated with any FINRA member.

McNamara filed an answer in which he admitted many of the underlying factual allegations. Additionally, three months before the hearing, the parties submitted joint stipulations. McNamara stipulated to liability on all of the violations alleged.

The Hearing Panel conducted a hearing on March 15 and 16, 2018. In July 2018, the Hearing Panel issued its decision finding McNamara liable on all causes asserted in the

complaint. In determining sanctions, the Hearing Panel found that each of McNamara's violations was the result of recklessness. The Hearing Panel fined McNamara a total of \$10,000, ordered him to requalify as a general securities representative before reentering the securities industry, and suspended him in all capacities for a total of three months.

On appeal, McNamara raises two main issues. First, he argues that the Hearing Panel erred in finding him liable for failing to disclose the Original Spousal IRA and the New Spousal IRA. Second, McNamara argues that the sanctions imposed are excessive.

III. Discussion

A. McNamara Violated NASD Rule 3050 and FINRA Rule 2010

Sound supervisory practices require that a FINRA member firm monitor personal accounts opened or established outside of the firm by its associated persons.³ NASD Rule 3050 was adopted to provide a means by which FINRA members would be informed of the extent and nature of transactions effected by their associated persons so that members might weigh the effect of such transactions handled outside their firms.⁴ NASD Rule 3050(c) provides:

A person associated with a member, prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with the other member; provided, however, that if the account was established prior to the association of the person with the employer member, the associated person shall notify both members in writing promptly after becoming so associated.

The scope of NASD Rule 3050(c) is clarified in paragraph (e) of the rule, which provides that paragraph (c) "shall apply only to an account or order in which an associated person has a financial interest or with respect to which such person has discretionary authority." *See* NASD Rule 3050(e).

The Hearing Panel found that McNamara violated NASD Rule 3050 and FINRA Rule 2010 by failing to disclose to AAM six of the eight accounts he and his wife held at Merrill

³ *Notice of Filing of a Proposed Rule Change to Adopt FINRA Rule 3210 (Accounts at Other Broker-Dealers and Financial Institutions) in the Consolidated FINRA Rulebook*, Exchange Act Release No. 75655, 2015 SEC LEXIS 3280, at *4 (Aug. 10, 2015) [hereafter, *Proposed Rule*].

⁴ *Id.* at *5-6.

Lynch while he was associated with AAM, as alleged in the complaint.⁵ For the reasons set forth below, we find McNamara liable for failing to disclose four of these accounts, but we vacate the finding of violation with respect to the Original Spousal IRA and the New Spousal IRA because the record is insufficient to determine McNamara's liability for these accounts.

1. McNamara Violated NASD Rule 3050 and FINRA Rule 2010 By Failing to Disclose to AAM Four of His Accounts at Merrill Lynch

McNamara stipulates to liability with respect to four of the accounts at issue: (1) the Original IRA, (2) the Original Rollover IRA, (3) the New Joint Account, and (4) the New IRA. The record confirms that McNamara had a financial interest in each of these accounts and that he failed to promptly disclose these accounts to AAM. We therefore affirm the Hearing Panel's finding that McNamara violated NASD Rule 3050 and FINRA Rule 2010 with respect to these accounts.⁶

2. The Record Is Insufficient to Determine Whether McNamara Violated NASD Rule 3050 and FINRA Rule 2010 By Failing to Disclose to AAM His Wife's IRAs at Merrill Lynch

We vacate the Hearing Panel's finding of liability with respect to the Original Spousal IRA and the New Spousal IRA because the record is insufficient to determine whether McNamara was required to disclose these accounts to AAM.

The record regarding these accounts was not fully developed at the hearing due to both parties' misreading of NASD Rule 3050. NASD Rule 3050 provides that an associated person must disclose an account held at another FINRA member in which he "has a *financial* interest or with respect to which [he] has discretionary authority." NASD Rule 3050(c) and (e).⁷ In its complaint, Enforcement alleged that McNamara failed to disclose to AAM six accounts in which he had a *beneficial* interest. McNamara admitted this allegation and later stipulated to liability under NASD Rule 3050 for all six accounts. The parties prepared for the hearing under the assumption that the only issue in dispute was the appropriate sanction for this violation.

⁵ McNamara and his wife had a total of eight accounts at Merrill Lynch. Enforcement did not allege that McNamara failed to disclose the Old Joint Account to AAM because McNamara disclosed it on the Account Disclosure Form when he joined the firm. Enforcement did not allege that McNamara failed to disclose the New Rollover IRA because AAM became aware of that account when it deposited McNamara's private placement shares in the account in April 2010.

⁶ A violation of NASD Rule 3050 is a violation of FINRA Rule 2010, which provides that associated persons, "in the conduct of [their] business, shall observe high standards of commercial honor and just and equitable principles of trade." See *Dep't of Enforcement v. Ng*, 2013 FINRA Discip. LEXIS 6, at *17 n.11 (FINRA NAC Apr. 24, 2013).

⁷ FINRA Rule 3210, which replaced NASD Rule 3050 in 2017, requires an associated person to disclose any account in which he has a "beneficial interest."

Shortly before the hearing, McNamara's attorney realized the allegation in the complaint differed from the text of NASD Rule 3050. On the first day of the hearing, McNamara's attorney asked that McNamara's liability be "put back in play" with respect to the Original Spousal IRA and the New Spousal IRA. He argued that a "beneficial interest" is different from a "financial interest," and that McNamara did not have a financial interest in either of his wife's IRAs. Enforcement argued that the term "beneficial interest subsumes the term financial interest," and that by admitting a beneficial interest, McNamara had admitted a financial interest, as well.⁸ Enforcement also argued that it would be unfairly prejudiced if liability was put back at issue because it had relied on McNamara's stipulation and had not prepared to present evidence on liability.⁹

The Hearing Officer ruled that McNamara would be allowed to "make the argument that the sanctions should be reduced or mitigated based on his argument that [NASD Rule 3050] does not apply to" the Original Spousal IRA or the New Spousal IRA.

In its decision, the Hearing Panel relied on McNamara's stipulations to find him liable for failing to disclose all six accounts, as alleged in the complaint. The Hearing Panel found that McNamara had a "beneficial interest" in the accounts—but it did not find that he had a "financial interest" in them. The Hearing Panel did not address McNamara's argument that he was not liable for failing to disclose the Original Spousal IRA or the New Spousal IRA.

McNamara argues that the Hearing Panel erred in finding that he violated NASD Rule 3050 by not disclosing the Original Spousal IRA and the New Spousal IRA. Enforcement counters that the Hearing Panel's finding is correct because the term "beneficial interest" necessarily includes "financial interest," and in any event, the evidence shows that McNamara did indeed have a financial interest in his wife's IRA because he exercised "at least some control" over his wife's accounts.

We decline to make a finding regarding McNamara's liability under NASD Rule 3050 for the Original Spousal IRA and the New Spousal IRA. We disagree with Enforcement that, by definition, for purposes of NASD Rule 3050, a beneficial interest in all instances equates with a financial interest.¹⁰ And we do not believe we can accurately determine, from the incomplete record before us, the true nature of McNamara's interest, if any, in his wife's IRAs. Our decision not to address McNamara's liability for these two particular accounts does not materially affect the outcome under cause one, however, because McNamara's liability already is

⁸ McNamara admitted to having a beneficial interest in his wife's IRAs because he was the named beneficiary for both accounts.

⁹ On appeal, Enforcement does not argue that McNamara should be bound by his stipulation of liability.

¹⁰ See *Proposed Rule*, 2015 SEC LEXIS 3280, at *39-40 (announcing that "FINRA has revised the proposed [FINRA Rule 3210] to extend to specified accounts in which the associated person has a *beneficial interest*." (emphasis in original)). FINRA, in proposing the new rule, said that FINRA Rule 5130(i)(1) defines "beneficial interest" to mean, in part, any economic interest, such as the right to share in gains or losses.

established based on his failure to disclose four other accounts, and a finding of liability for two additional accounts would not alter the sanction we impose for this violation. We therefore vacate the Hearing Panel's finding of liability and dismiss cause one with respect to the Original Spousal IRA and the New Spousal IRA.

B. McNamara Violated FINRA Rules 5130 and 2010 By Purchasing Equity Initial Public Offering Shares While Associated With AAM

The Hearing Panel found that McNamara violated FINRA Rules 5130 and 2010 by purchasing equity IPO shares while he was associated with AAM. We affirm the Hearing Panel's finding of violation.

FINRA Rule 5130(a)(2) provides that an associated person "may not purchase a new issue in any account in which such . . . person associated with a member has a beneficial interest, except as otherwise permitted herein."

McNamara stipulates that he violated FINRA Rule 5130 by purchasing equity IPO shares in the New Rollover IRA in November 2010. We therefore affirm the Hearing Panel's finding that McNamara violated FINRA Rules 5130 and 2010.¹¹

C. McNamara Violated FINRA Rule 2010 By Attesting That He Was Not Restricted from Purchasing Equity IPO Shares

The Hearing Panel found that McNamara violated FINRA Rule 2010 by inaccurately attesting to Merrill Lynch, via the Client Affirmation, that he was not associated with a FINRA member. We affirm the Hearing Panel's finding of violation.

FINRA Rule 2010 requires an associated person to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of his business. Providing false or inaccurate information to a FINRA member violates FINRA Rule 2010. *John C. Correro*, 2008 FINRA Discip. LEXIS 29, at *13-15 (NASD NAC Aug. 17, 2008).

McNamara stipulates that he violated FINRA Rule 2010 by inaccurately representing on the Client Affirmation that he was not associated with a FINRA member. We therefore affirm the Hearing Panel's finding that McNamara violated FINRA Rule 2010.

IV. Sanctions

The Hearing Panel fined McNamara a total of \$10,000, ordered him to requalify by examination as a general securities representative before reentering the securities industry in any capacity requiring registration, and suspended him in all capacities for a total of three months.

¹¹ A violation of FINRA Rule 5130 is a violation of FINRA Rule 2010. *David Harari*, 2015 FINRA Discip. LEXIS 2, at *16 (FINRA NAC Mar. 9, 2015) ("An associated person violates FINRA Rule 2010 when he or she violates any other FINRA rule[.]").

For the reasons set forth below, we affirm the amount of the fine and the order to requalify, but we reduce the suspension to 30 business days.

A. McNamara's Failure to Disclose Outside Brokerage Accounts in Violation of NASD Rule 3050 and FINRA Rule 2010 (Cause One)

For McNamara's violation of NASD Rule 3050, the Hearing Panel fined him \$5,000, ordered him to requalify by examination as a general securities representative before reentering the securities industry, and suspended him in all capacities for one month. McNamara argues this sanction is excessive.

In determining the appropriate sanction, we consider the sanction guideline for FINRA Rule 3210, which is the successor to NASD Rule 3050.¹² FINRA's Sanction Guidelines recommend a fine of \$1,000 to \$37,000 for violations of FINRA Rule 3210.¹³ In egregious cases, the Guidelines suggest a suspension of up to two years or a bar.¹⁴ The Hearing Panel did not find that McNamara's violation was egregious, but nonetheless suspended him because it found the violation was the result of recklessness, an aggravating factor under the Guidelines.¹⁵ For the reasons stated below, we affirm the fine and the order to requalify, but we reverse the finding of recklessness and vacate the suspension.

1. McNamara's Failure to Disclose All of the Original Accounts

Negligence is the failure to use "ordinary care," which is defined as "the degree of care that a reasonably careful person would use under like circumstances." *S.E.C. v. Wey*, 246 F. Supp. 3d 894, 912 (S.D.N.Y. 2017). "Recklessness," by contrast, is "not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care." *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1044-45 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977); *see also Michael J. Marrie*, 56 S.E.C. 760, 774-75 (2003) (an auditor's "recklessness" under SEC Rule of Practice 102(e) "can be established by a showing of an extreme departure from the standard of ordinary care for auditors."), *rev'd on other grounds*, 374 F.3d 1196 (D.C. Cir. 2004). Based on the facts and circumstances of this case, we find that McNamara's failure to disclose all of the Original Accounts was the result of negligence, not recklessness.

As an associated person, McNamara should have been aware of his obligations under NASD Rule 3050 when he joined AAM in May 2009, but he was not. During the preceding ten

¹² See *Proposed Rule*.

¹³ See *FINRA Sanction Guidelines*, 16 (Apr. 2017), http://www.finra.org/sites/default/files/2017_April_Sanction_Guidelines.pdf [hereinafter, *Guidelines*] ("For violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations.").

¹⁴ *Id.*

¹⁵ *Id.* at 8 (Principal Considerations in Determining Sanctions, No. 13).

years, McNamara had worked in corporate development for Merrill Lynch. He was not registered with FINRA nor was he involved in the firm's retail securities business. McNamara testified that he never had to disclose an account to Merrill Lynch under NASD Rule 3050 because all of his accounts were held at that firm.

McNamara completed the Account Disclosure Form shortly after his arrival at AAM. The Account Disclosure Form restated McNamara's obligations under NASD Rule 3050, but it did not refer to the rule or any other FINRA rule. McNamara testified that when he was completing the form, he did not make "a connection [] that [the Account Disclosure Form] was part of a larger scheme of regulations that [he] needed to be . . . extremely mindful and have an extremely high standard of care around." McNamara said he understood that AAM wanted to know about his accounts at Merrill Lynch so it could request duplicate confirmations and statements, but he did not know that he had a regulatory obligation to explicitly disclose each account.

McNamara disclosed only the Original Joint Account on the Account Disclosure Form. He testified that he did so because he thought that was sufficient for the purpose of the Account Disclosure Form. According to McNamara, at the time, he believed the Original Joint Account was his "main account" at Merrill Lynch, and that all of his other accounts were "household" with it. He believed this because the Original Joint Account held the vast majority of his and his wife's assets at Merrill Lynch; it was their most active account; Merrill Lynch always mailed statements to the McNamaras for all of their accounts in one package, and the statement for the Original Joint Account always was on top; and, when McNamara accessed his accounts online, the Original Joint Account always was listed first. McNamara said he assumed when he returned the Account Disclosure Form, AAM would request duplicate confirmations and statements for the Original Joint Account, and Merrill Lynch automatically would provide them for his other accounts.

The Hearing Panel concluded that McNamara acted recklessly in not disclosing all his accounts at Merrill Lynch on the Account Disclosure Form. The Hearing Panel found that McNamara should have acted on red flags that put him on notice of his obligation to disclose to AAM all his accounts at Merrill Lynch. These "red flags" are the Account Disclosure Form and an Annual Disclosure Form that McNamara signed in November 2009, both of which required McNamara to affirmatively acknowledge his obligation to disclose to AAM all accounts held at other broker-dealers. We agree with the Hearing Panel that McNamara was on notice that AAM required him to disclose all accounts at other broker-dealers. But neither of these "red flags" referred to NASD Rule 3050 or implied that FINRA required disclosure of all accounts held at other broker-dealers, nor did either of these "red flags" give McNamara reason to believe that his disclosure of only the Original Joint Account was insufficient for purposes of the Account Disclosure Form.

The Hearing Panel also concluded that there was no evidence to support McNamara's assumption that Merrill Lynch automatically would provide duplicate confirmations and statements for the other accounts once AAM requested them for the Original Joint Account. While we agree with the Hearing Panel that McNamara should not have relied exclusively on what the Hearing Panel calls a "mistaken supposition," we note there is no evidence that

McNamara's supposition was, in fact, mistaken. For unknown reasons, after McNamara disclosed the Original Joint Account to AAM on the Account Disclosure Form, AAM did not request duplicate confirmations and statements for that account from Merrill Lynch. Whether Merrill Lynch automatically would have provided confirmations and statements for all the accounts, as McNamara assumed, is not known.

Given these facts and circumstances, we find that McNamara failed to meet the standard of care for an associated person, but we do not believe his conduct was an "extreme departure" from that standard. We therefore conclude that McNamara acted negligently, not recklessly, when he failed to disclose all the Original Accounts to AAM.

2. McNamara's Failure to Disclose All of the New Accounts

McNamara's failure to disclose the New Joint Account and the New IRA in April 2010 also was negligent but not reckless. McNamara was registered by this time and concedes he was aware of his obligations under NASD Rule 3050. He testified, however, that he did not complete a new Account Disclosure Form when he opened the New Accounts because he did not think they actually were new accounts. McNamara said he believed he had simply "converted" his existing self-directed accounts into full-service accounts with the same firm. Indeed, shortly after McNamara discussed with his Merrill Lynch broker the possibility of moving his and his wife's assets from self-directed accounts to full-service accounts, the broker sent McNamara an email stating that the broker had "all of the instructions on how to *transition* ML direct accounts [i.e., the Original Accounts] to a branch office." (emphasis added) McNamara testified it did not occur to him that he was required to make a new disclosure for these accounts.

The Hearing Panel concluded that McNamara's failure to disclose the New Joint Account and the New IRA was reckless because he was "confronted with, but did not pay attention to, a number of red flags telling him he was required to disclose to AAM the [New Accounts]." These "red flags" are AAM's 2010 Annual Disclosure Form and the firm's 2011 Certification of Compliance with AAM's code of ethics. We agree with the Hearing Panel that these documents establish that McNamara was aware of his obligation to disclose to AAM all accounts held at another broker-dealer, but we do not agree that McNamara's failure to act on these "red flags" establishes McNamara's recklessness. McNamara testified that he did not disclose the New Joint Account and the New IRA because he erroneously assumed these were modified versions of his existing accounts—which he believed he already had disclosed—rather than new accounts. None of the "red flags" identified by the Hearing Panel would have put McNamara on notice of this error.

We also agree with the Hearing Panel's conclusion that a "responsible registered person would know [the New Accounts] had to be disclosed." McNamara's failure to disclose the New Joint Account and the New IRA certainly represents a departure from the standard of ordinary care a responsible registered person should have exercised. Under the facts and circumstances of this case, however, we do not believe that it was so extreme as to make it reckless.

Because we find that McNamara's violation of NASD Rule 3050 was the result of negligence rather than recklessness, we vacate the one-month suspension imposed by the

Hearing Panel. We affirm the \$5,000 fine because it is well within the Guidelines and is appropriately remedial for McNamara's misconduct. We also affirm the order to requalify by examination as a general securities representative before reentering the securities industry in any capacity requiring registration because McNamara's actions demonstrated a lack of knowledge of FINRA rules.¹⁶

B. McNamara's Purchase of Equity IPO Shares in Violation of FINRA Rules 5130 and 2010 (Cause Two) and Inaccurate Affirmation of Eligibility in Violation of FINRA Rule 2010 (Cause Three)

We find that a unitary sanction is appropriate for McNamara's violations under causes two and three because these violations arise from the same course of conduct: McNamara's improper purchase of equity IPO shares in November 2010. *See Dep't of Enforcement v. Fox & Co. Inv., Inc.*, 2005 NASD Discip. LEXIS 5, at *37 (NASD NAC Feb. 24, 2005) ("where multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve [FINRA's] remedial goals"), *aff'd*, Exchange Act Release No. 52697, 2005 SEC LEXIS 2822, at *36 (Oct. 28, 2005).

For McNamara's violation of FINRA Rule 5130, the Hearing Panel fined him \$2,500, ordered him to requalify by examination as a general securities representative before reentering the securities industry, and suspended him in all capacities for one month. The Hearing Panel ordered that the suspension run consecutively to the one-month suspension imposed under cause one. For McNamara's violation of FINRA Rule 2010, the Hearing Panel fined him \$2,500 and suspended him in all capacities for one month. The Hearing Panel ordered that the suspension run consecutively to the one-month suspensions imposed under causes one and two. McNamara argues that these sanctions are excessive.

For violations of FINRA Rule 5130, the Guidelines recommend a fine of \$1,000 to \$22,000, and a suspension in any or all capacities of up to 30 business days.¹⁷ In egregious cases, the Guidelines suggest a suspension of up to two years or a bar.¹⁸ The Hearing Panel did not find that McNamara's violation was egregious, but it did find that his misconduct was the result of recklessness, an aggravating factor.

There is no specific guideline for providing inaccurate information to a FINRA member in violation of FINRA Rule 2010. The Hearing Panel relied on the Principal Considerations and, in particular, its finding that McNamara acted recklessly in providing inaccurate information on the Client Affirmation.

For the reasons stated below, we fine McNamara a total of \$5,000 and suspend him in all capacities for a total of 30 business days for his violations under causes two and three. We also

¹⁶ *See Guidelines*, at 6 (General Principals Applicable to All Sanctions Determinations, No. 8).

¹⁷ *Id.* at 23.

¹⁸ *Id.*

order McNamara to requalify by examination as a general securities representative before reentering the securities industry in any capacity requiring registration.

1. McNamara Was Negligent But Not Reckless

We find that McNamara's violations under causes two and three were the result of negligence rather than recklessness. McNamara should have been aware that he was prohibited from purchasing equity IPO shares, but McNamara testified that he did not understand FINRA Rule 5130 and made no effort to educate himself before engaging in the IPO transaction. McNamara admits he spent little time reviewing the Client Affirmation and that he read it only "selectively" before signing it. McNamara testified that he assumed he was eligible to purchase equity IPO shares based on his "incomplete, imperfect understanding of who was allowed to participate in IPOs." McNamara explained that, from his experience at Merrill Lynch, he believed if an associated person's firm "was in the issue, if it was going to be an underwriter or syndicate member in the issue, it was a restricted security," and the associated person could not purchase the equity IPO shares. Because AAM was not involved in this particular equity IPO, McNamara erroneously believed he could participate in it. In short, McNamara was aware that participating in equity IPO transactions was regulated by FINRA, and he also was aware that he had only limited knowledge of the applicable FINRA rules. A reasonable person in McNamara's position would not have hastily signed a document entitled "Client Affirmation of Eligibility for Initial Public Offerings" without further inquiry. We do not believe, however, that McNamara's misconduct was the result of recklessness. Rather, we find that McNamara acted negligently when he provided inaccurate information on the Client Affirmation and purchased the equity IPO shares.

2. Aggravating Factors

For violations of FINRA Rule 5130, the Guidelines direct us to consider whether the respondent had an interest in the account in which the violative transaction occurred.¹⁹ We find it aggravating that McNamara owned the account in which the equity IPO shares were purchased, which resulted in the potential for his own monetary gain.

3. Mitigating Factors

We find there are several applicable mitigating factors. McNamara accepted responsibility for and acknowledged his misconduct prior to detection and intervention by AAM and FINRA and he made no attempt to conceal it.²⁰ As soon as McNamara realized the equity IPO transaction was violative, he contacted AAM's CEO and disclosed it. McNamara voluntarily and reasonably attempted to remedy his misconduct.²¹ Although we realize McNamara did so at the request of AAM's chief compliance officer, we believe he is entitled to

¹⁹ *Id.* at 23 (Principal Considerations in Determining Sanctions, No. 2, 4).

²⁰ *Id.* at 7 (Principal Considerations in Determining Sanctions, Nos. 2, 10).

²¹ *Id.* at 4 (Principal Considerations in Determining Sanctions, No. 4).

some credit for immediately selling the equity IPO shares and disgorging his profit before FINRA intervened. McNamara's misconduct under causes two and three was an isolated event that occurred over a period of a few days in November 2010, and he engaged in only a single violative transaction.²² We also give some mitigative value to AAM's termination of McNamara immediately following the issuance of the Hearing Panel's decision because we believe it materially reduces the likelihood of misconduct in the future.²³

McNamara asks us to credit him for additional mitigating factors that we do not find applicable. McNamara argues he is entitled to credit for providing substantial assistance to FINRA in its investigation, but the record does not establish that McNamara went beyond the level of assistance required from any associated person. *See Dep't of Enforcement v. VMR Capital Markets US*, 2004 FINRA Discip. LEXIS 18 (NASD NAC Dec. 2, 2004) (giving no credit where respondent's cooperation "only met his requirements" as an associated person). McNamara also notes that no customer was injured by his misconduct, but the absence of customer involvement is not mitigating. *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 (Feb. 24, 2012).

After considering McNamara's misconduct, and weighing the various aggravating and mitigating factors, we fine McNamara \$5,000 and suspend him in all capacities for 30 business days for his violations under causes two and three. We also order McNamara to requalify by examination as a general securities representative before reentering the securities industry in any capacity requiring registration. Satisfaction of the requalification requirement for cause one will satisfy this requalification requirement, as well.

V. Conclusion

We find that (1) McNamara failed to disclose to AAM accounts held at Merrill Lynch in which he had a financial interest, and therefore violated NASD Rule 3050 and FINRA Rule 2010; (2) McNamara purchased shares in an equity IPO while associated with AAM, and therefore violated FINRA Rules 5130 and 2010; and (3) McNamara provided inaccurate information to Merrill Lynch about his status as an associated person to facilitate the IPO transaction, in violation of FINRA Rule 2010. Accordingly, under cause one, we fine McNamara \$5,000 and order him to requalify by examination as a general securities representative before reentering the securities industry in any capacity requiring registration. Under causes two and three (unitary sanction), we fine McNamara \$5,000, order him to requalify as a general securities representative before reentering the securities industry in any capacity requiring registration, and suspend him in all capacities for 30 business days.²⁴ Satisfaction of

²² *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 8); *Paolo Franca Iida*, 2016 FINRA Discip. LEXIS 32, at *17-18 (FINRA NAC May 18, 2016).

²³ *Id.* at 5 (General Principles Applicable to All Sanctions Determinations, No. 7).

²⁴ Under FINRA Rule 8320, after seven days notice in writing, FINRA may summarily revoke the registration of a person associated with a member if such person fails to pay promptly a fine or other monetary sanction imposed pursuant to Rule 8310 or a cost imposed pursuant to Rule 8330 when such fine, monetary sanction, or cost becomes finally due and payable.

the requalification requirement under cause one will satisfy the requalification requirement under causes two and three. McNamara is ordered to pay hearing costs in the amount of \$3,804.29.

On behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary